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IN THE

Supreme Court of the United States

OCTOBER TERM 19~~64~~ 65

ALBRITTON ENGINEERING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In The

Supreme Court of the United States

October Term 19....

Albritton Engineering Corporation,
Petitioner,

v.

National Labor Relations Board,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Albritton Engineering Corporation[1] petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the instant case on January 11, 1965.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 340 F. 2d 281.[2] The Deci-

[1] Hereinafter called the Petitioner.

[2] The opinion, judgment, decree and order denying petition for rehearing are reproduced in Appendix A, *infra*.

sion and Order of the National Labor Relations Board[3] is reported at 138 NLRB 940.[4]

JURISDICTION

The opinion and judgment of the Court below were entered on January 11, 1965, and a decree was entered on February 2, 1965. On February 4, 1965, a petition for rehearing was timely filed. On February 23, 1965, the petition for rehearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. § 160.

QUESTIONS PRESENTED

I. Did the Board act within its statutory authority in issuing the complaint in the instant case, since the issuance of the complaint was in direct violation of the Rules and Regulations of the Board published pursuant to Section 3(a)(2) of the Administrative Procedure Act (5 U.S.C. § 1002(a)(2))?

II. Did the Court below err in concluding that an employer is prohibited from applying a rule against the rehire of former employees to permanently replace strikers?

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[3] Hereinafter called the Board.

[4] References to the formal papers, including the findings of fact, conclusions of law and orders of the Trial Examiner and of the Board, printed as Volume I of the Transcript of the Record in the Court below, are designated by the appropriate page number in Volume I of the Transcript of the Record preceded by "R".

References to portions of the testimony and exhibits, printed as the Joint Appendix to the briefs of the parties in the Court below, are designated by their appropriate page number in the Joint Appendix preceded by "J.A.".

Nine copies of Volume I of the Transcript of Record and the Joint Appendix are filed herewith.

III. Did the Court below err in concluding that Section 10(b) of the National Labor Relations Act, as amended[5] (29 U.S.C. § 160), did not bar the enforcement of the portions of the order of the Board relating to 4 of the complainants,[6] even though the causes of action, if any, of each of these 4 complainants accrued well over 6 months prior to the filing and service of their unfair labor practice charges?

IV. Did the Board exceed its statutory authority in enlarging the scope of the order of the Trial Examiner *sua sponte*, in the absence of any exception having been filed by either of the parties to the scope of the order of the Trial Examiner?

STATUTES INVOLVED

The relevant statutory provisions and rules and regulations are Sections 7, 8(a)(1) and (3), and 10(b) and (e) of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*), Section 1002 of the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*) and Sections 102.19, 102.46 and 102.48 of the Rules and Regulations of the National Labor Relations Board (29 C.F.R. § 102 *et seq.*). These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioner is a corporation engaged in the manufacture and distribution of residential and commercial aluminum windows at its two plants located in Bryan, Texas (R. 165, J.A. 79-80).

In June 1959, Local 458 International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers

[5] Hereinafter called the Act.

[6] Alvarado, Rameriz, Faust and Munoz.

and Helpers, AFL-CIO,[7] filed a petition with the Board requesting that an election be conducted among the production employees at the Petitioner's two plants (J.A. 73). Thereafter, the Petitioner and the Union mutually agreed that an election be conducted by the Board on August 9 or 10, 1959 (R. 166, J.A. 74, 70-71). At the election the Union secured a majority of the valid ballots cast and was certified as the collective bargaining representative of the employees at the two plants (R. 166, J.A. 70-71, 74). Following the Union's certification, negotiation meetings were held until an impasse was reached in the early part of June 1960 (R. 166, J.A. 71, 75).

On June 13, 1960, the Union called a strike and established picket lines at both of the Petitioner's plants (R. 168-69, J.A. 71-75). Of the approximately 140 employees employed by the Petitioner in its production departments, 54 of these employees ceased work and engaged in picketing of the plants (R. 168-69, J.A. 84).

During the strike, the Petitioner sent a letter to all employees who were engaged in the strike advising them that if they desired to return to work they should report no later than 7 a.m. on June 20, 1960, and that if they did not return to work by that time they might be permanently replaced.[8]

On June 20, 1960, the Petitioner commenced hiring permanent replacements for the strikers (R. 172). As each striker was permanently replaced, he was advised of his termination by a letter from the Petitioner.[9] By July 25,

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[7] Hereinafter called the Union.

[8] See General Counsel's Exhibit No. 2 (J.A. 27-28, 50, 482).

[9] See General Counsel's Exhibit No. 3 (R. 172, J.A. 158, 127-28, 483).

1960, all of the strikers, except two,[10] had been permanently replaced (R. 172, J.A. 88-89, 94).

The strikers held meetings on July 22 and 25, 1960, and decided that the strike would be terminated (R. 172, J.A. 76-77). The pickets were removed from the plant gates on July 22, 1960 (R. 172, J.A. 77).[11]

The application of the rule against rehiring former employees. Following the cessation of the picketing and during the period between July 22, 1960 and May 26, 1961, certain of the complainants herein communicated with the Petitioner, by telephone, letter or in person, regarding re-employment.

In the case of each of these applicants, the Petitioner applied its established policy regarding the rehire of former employees. This rule, as adopted and applied, provides that the Petitioner will not rehire any former employee regardless of the reason the employee was terminated (J.A. 424, 470, 392, 96). In applying this rule, an exception is made only when three requirements are met: *i.e.*, (1) a need exists at the time, which would be considered as abnormal in the ordinary course of business; (2) an opening or vacancy exists at the time the former employee applies for re-employment; and (3) the former employee's performance during his original employment was above average (J.A. 96, 111-13).

As many of the Petitioner's other policies (J.A. 394, 412-13), the Petitioner's rule regarding the eligibility for

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[10] The names of these two strikers are A. J. Carroll and Manuel Ruiz. Carroll returned to work on July 26, 1960 and was reinstated to his job (R. 172, J.A. 93, 180). Ruiz did not seek reinstatement and was permanently replaced by another employee who was upgraded to Ruiz' job sometime after July 25, 1960 (J.A. 90-91).

[11] The Petitioner was not advised of the termination of the strike until August 18, 1960, during a hearing before the Texas Employment Commission (J.A. 82-83, 78).

rehire of former employees has not been published in writing (R. 175, J.A. 394). On the other hand, the Petitioner has made no effort to "keep it to [itself]" (J.A. 411), and the existence and application of the rule was known among the employees.[12]

This rule has remained in full force and effect at all times since its adoption in November 1958 (J.A. 392, 323-24, 393, 424). This rule had been applied to former employees (other than strikers) on at least 22 occasions.

Personnel Manager Varner had applied the rule to deny employment to 9 former employees.[13] Varner explained the Petitioner's rule to each of these former employees as the reason for denying employment (J.A. 448).

Production Superintendent Kilgore had applied the rule to deny employment to 12 former employees.[14] Kilgore advised each of these former employees of the Petitioner's rule as the reason for denying employment (J.A. 433-34).

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[12] This was shown by the testimony of several of the witnesses. Complainant Johnson's testimony showed that she learned of the existence of the rule in the spring of 1959, and that from then until the time of the strike she discussed the rule on "quite a few occasions" with Complainants Currie, Stabler and Gossett (J.A. 342-43, 344, 345, 348-49). Former employee Evans' testimony also showed that in January of 1961 she was advised by her mother, who was an employee of the Petitioner, that she "thought [the Petitioner] had a policy of not rehiring" (J.A. 419). Complainant Alvarado recalled an occasion upon which the rule was applied (J.A. 300). Complainant Espinoza also admitted that he "might" have heard of the rule (J.A. 383).

[13] The names of these employees were Batten (J.A. 448), Bullard (J.A. 448), Cloud (J.A. 449), Earnest (J.A. 449), Evans (J.A. 449-50, 420), Gough (J.A. 450-51, 416-17), Grundman (J.A. 451), Rice (J.A. 451-52) and Vaquera (J.A. 452).

[14] The names of these employees were Cruz (J.A. 442, 425-26), Rhodes (J.A. 442, 426-27), Rufinno (J.A. 427), Coakley (J.A. 427-28), Evans (J.A. 428), Fazzino (J.A. 428-29), Harris (J.A. 429), Moye (J.A. 429), Webb (J.A. 429-30), Brown (J.A. 431-32), Vaughn (J.A. 432) and Snow (J.A. 433).

Although President Albritton does not normally become involved with matters regarding the employment of particular individuals, he did interview one former employee, Gough, and denied re-employment on the ground of this rule (J.A. 393-94).

Of these 22 instances in which this rule had been applied to deny re-employment to former employees, 5 of such instances involved former employees who had been *strike replacements.*[15]

During the entire existence of this rule, a total of only 6 exceptions were made (excluding strikers), and in each such case the former employee met all three requirements of the exception to the rule.[16] Of the 6 such exceptions, 3 were made prior to the beginning of the strike (J.A. 472-73).

The existence and uniform application of the rule was further solidified by the unchanged instructions by the Petitioner to the Texas Employment Commission. Slovacek, an employment interviewer for the Texas Employment Commission (J.A. 138),[17] was advised of the Petitioner's rule that it did not rehire former employees in 1958 (J.A. 161, 173). It was explained to him by the Petitioner that this rule applied "irrespective of the reason for termination" including if the employee quit or was discharged (J.A. 174-75).[18]

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[15] These employees' names were Earnest (J.A. 449), Evans (J.A. 449-50), Rice (J.A. 451-52) and Vaquera (J.A. 452).

[16] The names of these employees were Odstreil, Tuck, Richard Stange, Webb, Walter Stange and Conway (R. 201, J.A. 471, 477-78).

[17] Slovacek's testimony was credited (R. 180, 175).

[18] Slovacek understood that there was an exception to the rule (J.A. 177). He did not attempt to determine whether a particular former employee fitted into the exception (J.A. 177).

According to the credited testimony of Slovacek, the Petitioner's rule was in effect during the entire period of 1959, 1960 and 1961, and had been uniformly applied during that three year period (J.A. 173-74, 176). No representative of the Petitioner has ever stated any distinction to him which lead him to believe that this rule would not apply to permanently replaced strikers (J.A. 175).

The Petitioner equated the status of the replaced strikers to that of all other former employees in applying its rule regarding eligibility for re-employment (J.A. 100). Admittedly, this resulted in rendering these former employees ineligible for re-employment unless they satisfied the requirements of the exception to the rule, and this placed the strikers on an equal basis with all other former employees (J.A. 100).

In applying the rule to the replaced strikers, one such striker, Nesmith, was rehired on May 13, 1961, as she satisfied all three requirements of the exception to the rule (J.A. 115-16). Nesmith was rehired prior to the filing of any unfair labor practice charges.[19]

In addition to Nesmith, the past performance of 2 other complainants, Espinoza and Ruiz, qualified them as former employees with exceptional ability within the meaning of the exception to the Petitioner's rule (J.A. 113-14). It was admitted that none of the other complainants possessed sufficient ability to qualify for the exception (J.A. 115).

The only instance in which any deviation from the strict enforcement of the Petitioner's rule and its exception was made, resulted in a *preferential* treatment of replaced

[19] The first unfair labor practice charge, docketed as Case No. 23-CA-1237-1 (R. 1013), was filed with the Board on May 12, 1961, and was mailed on May 15, 1961 (R. 15), three days after Nesmith had been rehired (J.A. 115-16).

strikers. This involved the Petitioner's rehire of 2 permanently replaced strikers, Sylvester and Wallin, who were rehired *during the strike* (J.A. 93-95, 102). A special exception was made in these 2 instances only because of the extremely abnormal conditions which existed at the time as a result of the strike (J.A. 102-03, 121, 476). Any other replaced strikers who had applied for re-employment during that period also would have been rehired (J.A. 103).

The applications for employment by Alvarado, Rameriz, Faust and Munoz. The last communication Alvarado had with anyone at the Petitioner's plant about employment occurred on either August 18 or 19, 1960 (R. 185, J.A. 298-300, 302, 303). A vacancy for the job of "parts processor" was filled by hiring a new employee on August 29, 1960 (J.A. 485). The unfair labor practice charge on Alvarado's behalf[20] was filed on May 12, 1961, and was subsequently served upon the Petitioner at a date well over 6 months after the filling of the vacancy for which Alvarado was qualified (R. 213).

The last communication that Rameriz had with anyone at the Petitioner's plant about employment occurred during the first week of September 1960 (J.A. 59, 61-62, 68). A vacancy for the job of "frame preparation" was filled on October 10, 1960 (J.A. 485). The unfair labor practice charge was filed by Rameriz[21] on May 22, 1961, and was subsequently served upon the Petitioner at a date well over 6 months after the filling of the vacancy for which Rameriz was qualified (R. 213).

The last communication which Faust had with anyone at the Petitioner's plant occurred on July 22, 1960 (J.A. 224). A vacancy for the job of "frame preparation" was

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[20] Case No. 23-CA-1237-1 (R. 10).

[21] Case No. 23-CA-1237-9 (R. 46).

filled on October 10, 1960 (J.A. 485). The unfair labor practice charge on Faust's behalf[22] was filed on October 27, 1961, and was subsequently served upon the Petitioner at a date well over 6 months after the filling of the vacancy for which Faust was qualified (R. 213).

The last communication Munoz had with anyone at the Petitioner's plant occurred in either October or November 1960 (R. 186-87, J.A. 195-96, 198, 202). A vacancy for the job of "glazier" was filled on March 10, 1961 (J.A. 485). The unfair labor practice charge on Munoz's behalf[23] was filed on November 30, 1961, and was subsequently served upon the Petitioner at a date well over 6 months after the filling of the vacancy for which Munoz was qualified (R. 213).

The unauthorized issuance of the complaint. On June 26, 1961, the Regional Director of the Board refused to issue any complaint in the instant case and advised the charging parties by letter that a review of such refusal could be obtained by filing a request with the General Counsel of the Board in accordance with the requirements of Section 102.19 of the Rules and Regulations of the Board (J.A. 26). No request for review was made by any charging party within the 10 day time limit specified in Section 102.19 of the Rules and Regulations of the Board.

Later, on July 10, 1961, which was 14 days after the Regional Director's refusal to issue a complaint, the Director of the Office of Appeals for the General Counsel advised the attorney for the charging parties by telegram that an extension of time for the filing of a request for review had been granted until the close of business on July 31, 1961 (J.A. 26-27). Subsequently, the Regional Director's action in refusing to issue a complaint was reversed by the General

[22] Case No. 23-CA-1237-23 (R. 120).
[23] Case No. 23-CA-1237-27 (R. 137).

Counsel and the complaint was issued on September 28, 1961 (R. 91-96, J.A. 27).

The Petitioner filed a request with the General Counsel for reconsideration of the action in granting an extension of time and thereafter reversing the action of the Regional Director in refusing to issue a complaint (R. 97-98). On October 3, 1961, the Petitioner was advised by letter from the Office of the General Counsel that its request for reconsideration was denied because *"it has always been the practice of this Agency to grant [an] extension of time for the filing of appeals in appropriate circumstances notwithstanding [the absence of] any special provisions therefor, in the rules . . ."* (emphasis added) (J.A. 29).

The Board's conclusions and order. The Trial Examiner concluded that the Petitioner violated Section 8 (a)(3) and (1) of the Act by hiring new applicants and bypassing the strikers (R. 215-16). In reaching this conclusion, the Trial Examiner admitted that the Petitioner had a rule of not rehiring former employees (R. 201), but reasoned that the rule had been applied prior to the strike with a great degree of flexibility and "would not have been applied so sweepingly to the strikers had not the [Petitioner] had an ulterior motive" (R. 201-02). The Trial Examiner further concluded that even absent any animus against the strikers, and *regardless of the Petitioner's motivation in applying the rule to the strikers,* the application of the rule to strikers constituted a *per se* violation of Sections 8 (a)(3) and (1) of the Act (R. 203-05).

The Trial Examiner rejected the Petitioner's contention that the claims of Alvarado, Rameriz, Faust and Munoz were barred by Section 10 (b) of the Act (R. 213). The Trial Examiner admitted that no unfair labor practice could be based upon the filling of any vacancy which occurred more than 6 months prior to the filing and service

of these charges (R. 213). However, the Trial Examiner reasoned that since vacancies for which these 4 strikers were qualified continued to occur within the 6 months period preceding the service of the unfair labor practice charges, the filling of those subsequent vacancies with new employees in preference to these 4 complainants prevented the barring of the claims under Section 10 (b) of the Act (R. 214).

In his Intermediate Report, the Trial Examiner completely failed to consider the Petitioner's argument that the complaint had been improperly issued in violation of Section 102.19 of the Rules and Regulations of the Board.

Upon review, the Board found that the Trial Examiner's rulings did not constitute prejudicial error and adopted the findings, conclusions and recommendations of the Trial Examiner (R. 248). The Board then went one step further. Despite the fact that no exceptions to the scope of the order of the Trial Examiner had been filed by the General Counsel, the Board enlarged *sua sponte* the order of the Trial Examiner and required that the Petitioner's offer of immediate employment be made *"without prejudice to the seniority and other rights and privileges that they would have enjoyed as of the date they would have been employed absent the discrimination against them"* (emphasis added) (R. 249, fn. 2).

The opinion of the Court below. Except as to the reinstatement of 2 of the complainants, Ruiz and Espinoza, the Court below granted enforcement of the Board's order.

The Court rejected the application of the Petitioner's well established rule against the rehire of former employees as a defense, on the theory that "although a rule against job-hopping is not in itself unlawful and its adoption is a proper decision for management," employees who

leave their jobs to join in a strike "can hardly be considered unstable job-hoppers."

The Court admitted that numerous vacancies for which Alvarado, Rameriz, Faust and Munoz qualified, were filled well over 6 months prior to the filing and service of the unfair labor practice charges in the instant case. However, the Court chose to reject the application of Section 10 (b) of the Act on the tenuous theory that the applications of the 4 complainants were "continuing applications" for employment.

The Court also rejected the Petitioner's argument that the complaint was improperly issued, reasoning that the decision by the Eighth Circuit in *NLRB* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 764 (8th Cir. 1953), was determinative.

The Court failed to even consider the propriety of the Board's action in enlarging the scope of the order of the Trial Examiner *sua sponte.*

THE REASONS FOR GRANTING A WRIT

I. The complete failure by the Court below to require the Board to follow its published rules and regulations regarding the issuance of complaints is in conflict with applicable decisions by this Court and constitutes such a departure from the accepted and usual course of administrative and judicial proceedings as to call for an exercise of this Court's power of supervision

In decreeing enforcement of the Board's order, the Court below determined that the action by the Board in permitting the charging parties to untimely obtain review of the Regional Director's refusal to issue a complaint was permissible, despite the fact that such action by the Board was in direct violation of Section 102.19 of the Rules and

Regulations of the Board. Such action by the Court relates to "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature," *Morgan* v. *U.S.*, 304 U.S. 1, 19, *reh. denied* 304 U.S. 23, and the question raised by such action by the Court is of fundamental importance in the administration of the Act.

The Board is authorized to establish and maintain rules and regulations by virtue of the provisions of the Section 6 of the Act. However, Section 3 (a)(2) of the Administrative Procedure Act requires that such rules and regulations be currently published in the Federal Register in order to be effective and provides that "no person shall in any manner be required to resort to organization or procedure not so published."

The Rules and Regulations of the Board, as issued and published in the Federal Register in compliance with Section 3 (a)(2) of the Administrative Procedure Act, provide in certain limited instances for the granting of extensions of time for the filing of certain types of papers.[24] However, the Rules and Regulations neither authorize, nor permit, the granting of any extension of time for the filing of any request for review of the action of a Regional Director in refusing to issue a complaint in an unfair labor practice case. Rather, Section 102.19 requires that such a request for review be filed with the General Counsel of the Board within 10 days from the date of the notice of the refusal by the Regional Director.

Because the Board has issued and published a specific rule and regulation governing the circumstances under which requests for review of refusals to issue complaints

[24] See *e.g.*, Section 102.46 of the Rules and Regulations of the National Labor Relations Board (29 C.F.R. § 102.46).

in unfair labor practice cases may be filed, neither the Board nor its General Counsel should be permitted to arbitrarily exercise its discretion in a manner directly contrary to that specific rule and regulation.

In *Maryland Cas. Co.* v. *U.S.*, 251 U.S. 342, this Court held as follows:

> "It is settled by many recent decisions of this Court that a regulation by a department of government, addressed to and reasonably adopted to the enforcement of an Act of Congress, the administration of which is confided to such department, *has the force and effect of law* if it be not in conflict with the express statutory provision." (emphasis added)

See *Atchison T. & S. F. R. Co.* v. *Scarlett*, 300 U.S. 471; *Paul* v. *U.S.*, 371 U.S. 245.

The decisions of the Courts of Appeal have uniformly applied the identical principle in interpreting the Rules and Regulations of the Board. In *NLRB* v. *United Brotherhood of Carpenters & Joiners of America, AFL-CIO*, 261 F. 2d 166 (7th Cir. 1958), the Court required compliance with Section 102.73 of the Rules and Regulations by the Board itself and held as follows:

> "This rule was as binding upon the Board itself, as it was upon any other person or organization." [25]

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[25] The decision in the *Carpenters* case, *supra*, was cited with approval by this Court in *NLRB* v. *Radio Engineers Union*, 364 U.S. 573, fn. 27.

II. The conclusion by the Court below that an employer is prohibited from enforcing a rule prohibiting the rehire of former employees to permanently replaced strikers is in conflict with the decisions of other Courts of Appeal and raises an important question of federal law which has not, and should be, settled by this Court

The primary reason stated by the Court below for concluding that substantial evidence supported the Board's finding that the Petitioner's rule prohibiting the rehire of former employees was a pretext for unlawful discrimination, was that although "a rule against job-hopping is not in itself unlawful and its adoption is a proper decision for management", employees who leave their jobs to join in a strike can "hardly be considered unstable job-hoppers." The Petitioner's rule prohibiting the rehire of former employees was not, and had never been, limited in its application to former employees who might be thought of as "job-hoppers". The rule was uniformly applied to all former employees, irrespective of the reason for their termination. Under these circumstances, the net result of the reasoning by the Court below is that an employer is free to adopt and enforce a rule prohibiting the rehire of former employees, except when such former employees are permanently replaced strikers. Such a preferential treatment of union adherents is condemned by Section 8 (a)(3) and (1) of the Act, as recognized by decisions of various Courts of Appeal. See *Quality Casting Co.* v. *NLRB*, 325 F. 2d 46 (6th Cir. 1963); *Pittsburgh-Des Moines Steel Co.* v. *NLRB*, 284 F. 2d 74 (9th Cir. 1960).[26] *Cf.*, *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221.

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[26] The decision in *Pittsburgh-Des Moines Steel Co., supra,* was cited with approval in *Local 357, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *NLRB*, 365 U.S. 667.

Nor was the Court below warranted in placing any reliance upon any evaluation of an employer's business judgment in applying its management policies to former employees, even though the Court might have considered such former employees to be preferable applicants for employment. The decisions of the other Courts of Appeal have recognized that the law governing labor relations has not reached the point that an employer's business judgment, however faulty, may be set aside by the Board or the Court. The improper reliance by the Court below upon its evaluation of the Petitioner's business judgment in applying its management policies to former employees, and the attempt by the Court below to redefine the Petitioner's rule, is in direct conflict with the decisions of other Courts of Appeal. See *NLRB* v. *Audio Industries, Inc.*, 313 F. 2d 858, 861, 863-64 (7th Cir. 1963); *NLRB* v. *Murray Ohio Mfg. Co.*, 326 F. 2d 509, 512-14 (6th Cir. 1964).

III. The conclusion by the Court below that Section 10 (b) of the Act did not bar the enforcement of the portions of the order of the Board relating to 4 of the complainants, even though the causes of action, if any, of each of these complainants accrued well over 6 months prior to the filing and service of the unfair labor practice charges, is in conflict with applicable decisions by this Court and the decisions by other Courts of Appeal

As admitted in the opinion by the Court below, during the pendency of applications for employment by 4 of the complainants,[27] vacancies for which these 4 complainants qualified, were filled well over 6 months prior to the filing and service of their unfair labor practice charges. Consequently, since in cases involving an alleged refusal to rehire the limitation period provided in Section 10 (b) of the Act

[27] Alvarado, Rameriz, Faust and Munoz.

begins running when another applicant for employment is hired during the pendency of a valid application for employment filed by the complainant,[28] the Petitioner's limitation argument regarding these 4 complainants appeared unrebuttable. However, the Court below chose to reject this defense on the tenuous theory that these applications for employment were *continuing* applications. This continuing violation theory directly contradicts the intent of Congress and the express language of Section 10 (b) of the Act, and is in direct conflict with the decision by the Third Circuit in *NLRB* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524-25 (3rd Cir. 1952). In *Pennwoven, supra*, the Third Circuit pointed out as follows:

> ". . . We conclude that when the Respondent in this case failed to call these three people back to work and they knew it and they knew, or thought they knew, why they were not being called back, the Respondent's act of discrimination had taken place and his liability accrued thereupon. We do not think it continues indefinitely, but it is barred if charges are not brought within six months."

Compare *NLRB* v. *Childs Co.*, 195 F. 2d 617, 621 (2d Cir. 1952) (concurring opinion of Mr. Justice Learned Hand).

The theory of the Court below also operates to "cloak with illegality that which was otherwise legal", because the only applications for employment were filed by these 4 complainants more than 6 months prior to the filing and service of the unfair labor practice charges, and therefore an indispensible element of the cause of action was placed outside the statutory time limit. Accordingly, the decision of the Court below is in conflict with the decision of this Court in *Local Lodge No. 1424, Int'l Ass'n of Mach.* v. *NLRB*, 362 U.S. 411.

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[28] See *NLRB* v. *Textile Mach. Works, Inc.*, 214 F. 2d 929, 932 (3rd Cir. 1954).

IV. The Board exceeded its statutory authority in enlarging the scope of the order of the Trial Examiner sua sponte in the absence of any exception to the order having been filed by either of the parties, and this action by the Board constitutes such a departure from the accepted and usual course of administrative and judicial proceedings as to call for an exercise of this Court's power of supervision

Sections 102.46 and 102.48 of the Rules and Regulations of the Board command that the orders of Trial Examiners be accepted by the Board in the absence of any exceptions having been filed by the parties to the order. Since these Rules and Regulations are mandatory in nature and have the force and effect of law[29] and are substantially identical to the mandates of Section 10 (e) of the Act, the Board's action *sua sponte* in expanding the scope of the order of the Trial Examiner in the absence of any exception thereto having been filed, conflicts with the decisions of this Court. See *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *NLRB* v. *United Mine Workers of America*, 355 U.S. 453; *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 350; *NLRB* v. *Cheney Calif. Lumber Co.*, 327 U.S. 385, 388-89.

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[29] See *Maryland Cas. Co.* v. *U. S.*, 251 U.S. 342; *Atchison T. & S. F. R. Co.* v. *Scarlett*, 300 U.S. 471; *Paul* v. *U. S.*, 371 U.S. 245.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21064

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ALBRITTON ENGINEERING CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(January 11, 1965.)

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

WISDOM, Circuit Judge: The National Labor Relations Board petitions for enforcement of an order against Albritton Engineering Corporation. The order is based on the Board's finding that the respondent was in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act for refusing to rehire former "economic" strikers after the strike ended. In addition to the cease

and desist provisions, the order requires the Company to reinstate and make whole twenty-one strikers denied reemployment. We grant enforcement of the order, except as to two of the striking employees.

Albritton has two plants at Bryan, Texas. The Company makes and sells aluminum windows. In August 1959 the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers was certified as bargaining representative of the production employees at the two plants. Negotiations between Albritton and the Union limped along until June 1960, then collapsed. In late May or early June 1960, Ford D. Albritton, Jr., president of the Company, anticipating a strike, called together the workers from both plants and talked to them for about half an hour. Albritton bemoaned the fact that he and the employees would no longer be "one big happy family", and reminded them that under the Texas Right to Work law members of the Union did not have to join any strike that might be called. He promised that he would protect any employee who did not join the strike, and warned that he would replace any who did. June 13, 1960, about fifty-five of the Company's one hundred forty employees walked out. On that day Albritton made speeches at each plant to the employees who had not struck. He repeated and elaborated his earlier statements, and assured the men that the plants would stay open. Albritton announced that any striker who wanted to do so could return to work, and that any who did not return would be permanently replaced. During the first week of the strike the Company sent letters to the strikers, telling them that if they wanted to return they should report for work by 7:00 A.M., June 20. One came back. By July 25 all but two of the strikers, the Company's two most senior

employees, had been replaced. July 22, the Union announced its intention to withdraw financial support from the strike. That day, deterred, the strikers stopped picketing.

Between July 25, 1960 and May 15, 1961, further jobs became available and a number of the former strikers asked the Company for reemployment. Only one succeeded. From November 14, 1960 to May 13, 1961, the respondent hired forty-six employees for jobs that the strikers were qualified to perform. May 15, 1961, the Union filed a charge alleging that Albritton had discriminatorily refused employment to twenty-one named complainants. The Trial Examiner and the Board found for the Union. 138 NLRB No. 115.

The Company was privileged to replace strikers during the strike, in the interest of keeping its business going. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 1937, 304 U. S. 333, 58 S. Ct. 904, 82 L Ed. 1381. It was not privileged to discriminate against them when they applied for jobs later becoming available. *N.L.R.B.* v. *Erie Resistor Corporation*, 1963, 373 U. S. 221, 83 S. Ct. 1139, 10 L. Ed. 2d 308. To refuse to hire, or to rehire, job applicants because of their union membership or activity violates Section 8(a)(1) and (3) of the Labor Relations Act. *Phelps Dodge Corporation* v. *N.L.R.B.*, 1941, 313 U. S. 177, 61 S. Ct. 845, 85 L Ed 1271; *N.L.R.B.* v. *American Compress Warehouse Division of Frost-Whited Company, Inc.*, 5 Cir. 1963, 321 F. 2d 547, 549.

We hold that substantial evidence on the record as a whole supports the Board's findings that nineteen of the complainants — all, that is, except Ruiz and Espinoza — applied to Albritton for reemployment and were rejected for a discriminatory motive. Not all of the nineteen filed

written application forms; some inquired only by telephone. But each communicated to some responsible company official his request to be rehired, and was told either that he was not eligible, or that the Company would consider his application and let him know if there were any openings.

Two of the complainants, Ruiz and Espinoza, had not applied directly to the Company as of the time that their charges were filed. Both were registered for employment with the Texas Employment Commission from about the time the strike ended until May 26, 1961. Espinoza tried three times, unsuccessfully, to telephone Albritton's personnel managers, Varner and Kilgore, but did not ask that his calls be returned. Ruiz made no attempt to get in touch with any company official until he applied for employment on May 15, 1961, three days after he had signed his charge of discrimination. April 10, 1961, personnel manager Kilgore told the employment commission that Albritton's standing policy of not rehiring former employees was applicable to strikers. May 2, 1961, the Company asked the commission for three employees. The commission referred seven applicants, but passed over Espinoza, Ruiz, and other strikers. Albritton hired three or four of these applicants.

The Examiner and the Board found that the Company was estopped from disavowing responsibility for the actions of the employment commission, and ordered Espinoza and Ruiz reinstated. The Board's reliance on estoppel seems to us misplaced. Application to the commission was not application to the Company, and there is no evidence that Espinoza or Ruiz ever thought otherwise. We must deny enforcement as to these two complainants.

As for the Company's refusal to hire the nineteen employees who did apply for jobs, the Board's finding of

discriminatory motive is supported by substantial evidence, but just barely. President Albritton's speeches to the employees, before and after the strike, and a similar speech by personnel manager Varner, demonstrate the Company's anti-union animus. Taking the record as a whole and bearing in mind the Company's strong anti-union policy, the Board could reasonably conclude that the Company's repeated refusal to rehire replaced strikers despite their qualifications was because of their having participated in the strike.

In defense, Albritton attributes its refusal to rehire the strikers to its policy of never rehiring former employees. The Company contends that after a cost analysis study in 1958, it adopted this policy to eliminate "job hopping" at its plants; an employee who quits once, if rehired is likely to quit again. An interviewer at the employment commission recalled being told of the policy sometime in 1958. However, the policy was never published or communicated generally to the employees. And it was not rigidly enforced. Personnel manager Varner — who, however, was not in Albritton's employ, during the entire period between December 1960 to May 1961 — admitted that seven former employees had been rehired since the policy was adopted. The Company insists that each of these employees qualified as an exception to the rule by meeting certain requirements. This explanation seems attenuated.

The Board found that the Company was using the policy as an excuse for not taking back the strikers, and that its real purpose was to discourage union activity at its plants. The finding is supported not only by the admitted exceptions to the Company's rule, but also by the fact that personnel manager Varner accepted a number of written applications from former strikers, and in many

instances failed to mention the Company's policy of not rehiring former employees. In fact, the first time the policy was ever mentioned to any striker was in March of 1961. A rule against job-hopping is not in itself unlawful and its adoption is a proper decision for management. But as we read the record, we cannot say that the Board's skepticism toward the Company's explanation was unwarranted. Employees who leave their jobs to join in a strike can hardly be considered unstable job-hoppers. We find that substantial evidence and fair inferences support the Board's finding that the rule was a pretext for unlawful discrimination.

The Company asserts several other defenses. First, the Company argues that the reason employees Currie, Gossett, Stabler, Alanis, Johnson, and Hurt (and Ruiz) were not hired was that they applied for specific skilled jobs to which they were not entitled under the Company's "hire-in" policy of employing new applicants for simple jobs only. But these men could not be considered as "new" employees in any sense that accords with the policy, since they had been employed before to the satisfaction of the Company. Moreover, Hurt, Stabler, and Johnson made unqualified applications for employment. Considering these and other circumstances, we sustain the Board's finding that these applications were in fact rejected because of the Company's policy not to rehire the strikers.

Second, the Company argues that the order as to Alvarado, Ramirez, Faust, and Munoz is improper under Section 10(b) of the Act, because these applicants applied for work more than six months before the filing of charges in their behalf. Section 10 (b) forbids issuance of a complaint based on any unfair labor practice occurring more than six months before the filing and serv-

ice of the charge. The record, however, establishes that the applications of Alvarado, Ramirez, Faust, and Munoz were regarded by both the applicants and the Company as *continuing* applications. The Company's practice was to keep its applications on file for use in filling vacancies. The Personnel Manager assured the complainants that he would let them know when jobs became available; told Faust that his original application would be considered still open; told Ramirez and Munoz that he would let them know when a job became available. On these and other facts relating to this Company's practices in handling applications, we are constrained to hold that the Company committed a separate unfair labor practice each time, between November 15, 1960 and May 15, 1961, that it bypassed for discriminatory reasons the application of a former striker. Section 10(b), therefore, is not necessarily an obstacle to enforcement of the Board's order. See *N.L.R.B.* v. *Textile Machine Works,* 3 Cir. 1954, 214 F. 2d 929, 932; *N.L.R.B.* v. *Plumbers and Pipe Fitters Local Union 214,* 7 Cir. 1962, 298 F. 2d 427. See also *Local Lodge 1424, I.A.M.* v. *N.L.R.B.,* 1960, 362 U.S. 411, 416, 80 S. Ct. 822, 4 L. Ed. 2d 832.

Finally, the respondent contends that the complaint was improperly issued. Before any hearings were held in this case, the respondent filed a motion to dismiss the complaint. The motion alleged that the complaint violated Section 102.18 of the Board's Rules and Regulations (Series 8). 29 C.F.R. § 102.19.[1] June 26, 1961, the Regional Director refused to issue a complaint on charges filed by

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[1] Section 102.19 provides:

> *"Review by the general counsel of refusal to issue.* — If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the

some of the employees. He notified the parties that an appeal might be made to the General Counsel in accordance with Section 102.19 and that upon good cause, the General Counsel might grant an extension of time in which to file an appeal. July 7 the complainants requested an extension. July 10 the Regional Director then granted an extension. An appeal was filed within the extension of time allowed. In substantial part, the appeal was granted. September 28, 1961, a complaint issued. That same day, the respondent requested the General Counsel to reconsider its decision reversing the Regional Director on the ground that the Board's Rules and Regulations do not authorize or permit the grant of an extension of time within which to file an appeal. There is no merit to the respondent's contention. We agree with the Eighth Circuit's holding in *N.L.R.B.* v. *Monsanto Chemical Company*, 1953, 205 F. 2d 763, 764, a similar situation:

> "The bold argument on behalf of respondents is that the Board is powerless in the public interest to relax the time provisions of its procedural rules in any case before it. . . .
>
> It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. . . . The rule stated applies with especial force in cases before the National Labor Relations Board. The Board acts in the public interest and not in vindication of public rights. . . ."

We GRANT enforcement of the Board's order, except as to the reinstatement of Ruiz and Espinoza.

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general counsel in Washington, D.C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based."

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21064

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ALBRITTON ENGINEERING CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

JUDGMENT

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on September 26, 1962, in the proceedings known upon the records of the Board as Case Nos. 23-CA-1237-1, et al, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be and the same is hereby, enforced in part and denied in part, in accordance with the opinion of this Court.

"Per Wisdom, Circuit Judge"

January 11, 1965

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ALBRITTON ENGINEERING CORPORATION,
Respondent.

DECREE ENFORCING, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

BY THE COURT:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated September 26, 1962. The Court heard argument of respective counsel on October 7, 1964 and has considered the briefs and the transcript of record filed in this cause. On January 11, 1965, the Court, being fully advised in the premises, handed down its decision enforcing in part and denying in part the Board's Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that Albritton Engineering Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 458, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or in any

other labor organization, by refusing to employ or in any other manner discriminating against any employee or applicant for employment in regard to his hire, tenure of employment, or any term or condition of employment.

(b) In any manner interfering with, restraining or coercing employees or applicants for employment in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the National Labor Relations Act, (hereinafter called the Act).

(a) Offer the employees listed in the attached appendix, "Notice To All Employees," immediate employment, in the manner provided in the section of the Trial Examiner's Intermediate Report entitled "The remedy," and make each of said employees whole for los es suffered as a result of the Respondent's discrimination against him, together with interest thereon at 6 percent per annum, as provided in "The remedy."

(b) Preserve and make available to the Board or its agents, upon request, all payroll and other records relevant to a determination of the amount of backpay due under the terms of this Decree.

(c) Post in conspicuous places at its plants in Bryan, Texas, including all places where notice to employees and applicants for employment are customarily posted, copies of the notice attached hereto as Appendix. Copies of said

notice, to be furnished by the Regional Director for the Twenty-third Region of the National Labor Relations Board, (Houston, Texas) shall, after being duly signed by the Respondent's representatives, be posted by it immediately upon receipt thereof, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director in writing within 10 days from the date of this decree, what steps respondent has taken to comply herewith.

(ORIGINAL FILED FEB. 2, 1965)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECREE

of the United States Court of Appeals enforcing in part, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees and applicants for employment that:

WE WILL NOT discourage membership in LOCAL 458, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, or in any other labor organization by refusing to hire applicants for employment, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, because of their union affiliation or activities.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join or assist the above-named LOCAL 458, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in strikes and other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer the striking employees named below immediate employment at our plants, in the man-

ner provided in the Trial Examiner's Intermediate Report and the Board's Order.

Hiram Brewster	Eleanor Currie	Henry Charanza
Pete Ramirez	Albert Faust	Fred Alanis
Velma Hines	Lela Burlin	Albert Kacer
Joe Alvarado	M. S. Copeland	Johnny Munoz
Roy Clanton	Vivian Gossett	Elmer Chambers
Clara Stabler	Rita Johnson	George Hurt
Bernard Pivonka		

WE WILL make whole the striking employees named above for any loss of pay they may have suffered by reason of our refusal to reemploy them.

ALBRITTON ENGINEERING CORPORATION
(Employer)

Dated ..... By .....
(Representatives) (Title)

NOTE: — WE WILL notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, (Tel. No. Capitol 8-0611 Ext. 296), if they have any question concerning this Notice or compliance with its provisions.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21064

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ALBRITTON ENGINEERING CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board Sitting at Washington, D.C. (Texas Case.)

(February 23, 1965)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby

DENIED.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) of such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, . . . and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective

date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender; the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

"Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place

and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce

additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

The relevant provisions of the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*) are as follows:

"§ 1002. *Publication of information, rules, opinions, orders and public records*

"Except to the extent that there is involved (i) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or

requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

The relevant provisions of the Rules and Regulations of the National Labor Relations Board, Series 8 as amended (29 C.F.R. 102 *et seq.*) are as follows:

"Sec. 102.19 *Review by the general counsel of refusal to issue.* If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D.C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

* * *

"Sec. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.

* * *

"Sec. 102.48 *Action of Board upon expiration of time to file exceptions to intermediate report.* (a) In the event no statement of exceptions is filed as herein provided the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1132

ALBRITTON ENGINEERING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–8a) is reported at 340 F. 2d 281. The Board's Decision and Order (R. 248–250, 164–255)[1] are reported at 138 NLRB 940.

JURISDICTION

The judgment of the court of appeals was rendered on January 11, 1965 (Pet. 9a), and its decree enforcing the Board's Order was entered on February 2, 1965 (Pet. 11a–13a). A timely petition for rehearing was denied on February 23, 1965 (Pet. 17a).

[1] "R." and "J.A." references are to the Transcript of Record and to the Joint Appendix in the court below.

The petition for a writ of certiorari was filed on May 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) of the National Labor Relations Act by denying reemployment to 19 strikers because they had participated in a strike against it.

2. Whether the complaint was barred by the limitations period contained in Section 10(b) of the Act.

3. Whether the General Counsel was empowered to grant the charging parties an extension of time to file a request for review of the Regional Director's refusal to issue a complaint.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act and the Board's Rules and Regulations are set forth at pages 19a–24a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In August, 1959, following an election held pursuant to a consent agreement, the Union [2] was certified as bargaining representative for the employees at petitioner's two plants at Bryan, Texas (R. 166; J.A. 69–71). Bargaining negotiations began shortly there-

[2] Local 458, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

after and continued until an impasse was reached early in June, 1960 (R. 166; J.A. 71).

During the week of May 23, 1960, petitioner's president, Ford D. Albritton, Jr., learning that a strike had been authorized, called the employees of both plants together and spoke to them for half an hour. He told the employees that they had been "one big family" to him and that he wanted to keep it that way; that, under the Texas right-to-work law, they did not have to join any strike that might be called even if they were members of the Union; and that he would protect any employees who saw fit to work during a strike. Finally, Albritton warned the employees that if they walked out he would not take them back but that they would be replaced, as the Company had many applications from people who wished to work for it (R. 166–168; J.A. 126–127, 143–144, 179–180, 192–194, 206–207, 209, 220, 230–231, 239, 247, 253–254, 262–263, 267, 273–274, 288, 296–297, 317, 326–328, 335–336, 351).

The Union called a strike on June 13, 1960 (R. 168–169; J.A. 71). More than 50 of petitioner's 140 employees, including the 19 individuals here involved, walked out of the plants (R. 168–169; J.A. 84). Toward the end of the day, President Albritton addressed the employees who had not joined the strike. After thanking them for their loyalty to the Company in appearing for work, he advised them that, although the Union had a right to strike and to picket peacefully, it could not lawfully prevent employees from

entering the plant. He added that the plant would remain open under present working conditions and that, while absent employees would be given an opportunity to return to work, strikers who chose not to return would be permanently replaced (R. 169–171; J.A. 407–408).

During the first week of the strike, petitioner sent letters to the strikers notifying them that if they wished to return to work they must report by 7 a.m., June 20, 1960, and that, if they did not return by the designated time, they might be replaced by "one of the many applicants who would like to work" for the Company (R. 171–172; J.A. 482). One striker returned to work on June 20 (R. 172; J.A. 89, 93). The Company immediately began replacing the others. Each was notified, when his replacement was hired, that his services had been terminated (R. 172; J.A. 91, 483–484).[3] By Friday, July 22, all but two strikers had been replaced (R. 172; J.A. 89). On that date, the Union notified the strikers that it was withdrawing financial support for the strike, whereupon the strikers decided to discontinue the strike and the picketing (R. 172; J.A. 76–77).

The present case involves 19 strikers (hereafter the complainants) who applied for, but were denied, reemployment at the end of the strike. Nine of these complainants applied for work at various times dur-

[3] However, two strikers who returned before the end of the strike were reemployed even though replacements for them had been hired (R. 177; J.A. 93).

ing the month of August.[4] They were told that no jobs were available at that time, but some were assured that they would be called as soon as there was an opening (R. 181–184; J.A. 61, 151, 207, 220–221, 299).

The Company did not hire any more new permanent employees until early in October, 1960, when it passed over the strikers who had applied for jobs and hired five new applicants. On October 10, Personnel Manager Varner assembled the five newcomers, spoke to them on the subject of plant rules, and explained the operation of the insurance sharing programs. One of the employees asked about the strike, and a discussion of the Union followed. Varner told the newcomers that President Albritton had told the employees that he "wanted everybody to be one big family" and was not going to have a union in the plant; that 54 employees had gone out on strike and, though requested, they had refused to return to work; and that, as a result, all 54 had lost their jobs (R. 172–173; J.A. 362–365).

About the middle of October, Johnny Munoz, another of the 19 complainants, applied for reemployment and was told by Varner that no job was available at that time but that he would be notified if an opening occurred (R. 186–187; J.A. 194–196, 199–200). Five permanent production workers were hired between October 13 and October 27, 1960 (J.A. 485–487).

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[4] Faust, Brewster, Ramirez, Chambers, Burlin, Hines, Alvarado, Hurt, and Clanton, Jr. (R. 181–186; J.A. 59, 110; 181, 188, 207–208, 247, 254–255, 263–264, 298–299, 489, 490).

Late in March, 1961, the strikers learned that the Company was again hiring employees. The remainder of the 19 complainants, and some of those who had applied before, applied for work with the Company between the latter part of March, 1961, and May 15, 1961. They were told either that petitioner had a policy not to employ former employees (R. 184–191; J.A. 144–148, 265, 266, 352–354)[5] or that they would be called if there were any openings (R. 185–186, 190–193; J.A. 231–232, 240–241, 247–248, 266). The Company hired 86 new employees between November 15, 1960, and May 13, 1961, for jobs which the complainants were qualified to perform (R. 195; J.A. 485–487). None of the 19 complainants was hired for any of these jobs (R. 195).

[5] The Company's policy of not reemploying former employees was adopted in December, 1958, for the specific purpose of saving petitioner the cost of retraining an employee who was essentially a "job hopper" and who, having once quit petitioner's employment, could be expected to quit again (R. 174–175; J.A. 97, 421–423). The policy had never been published or otherwise communicated generally to the employees (R. 175; J.A. 97, 410–411). Prior to the termination of the strike, it had been applied with great flexibility. According to the testimony of Personnel Manager Varner (R. 176; J.A. 447–455, 471–481) and Production Scheduler Kilgore (R. 175–176; J.A. 425–434), 11 former employees had applied for reemployment between the adoption of the policy in December, 1958, and the strike in June, 1960. Of these, the Company had accepted six and had rejected five (J.A. 449–453; 471–479, 425–433). Moreover, during the strike, the Company offered reemployment to two former employees (J.A. 477–478), and reemployed two strikers who had abandoned the strike, even though they had been replaced (R. 177; J.A. 471–472).

B. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board, affirming the Trial Examiner, found that the 19 complainants had made timely applications for reemployment, that these applications were intended by the strikers and were regarded by the Company as continuing applications, and that the Company had bypassed the complainants and hired new employees. The Board further found that the Company denied reemployment to the 19 complainants, not because of a policy against the hiring of former employees (as the Company contended), but because they had engaged in union and strike activity. Accordingly, it concluded that the Company's action constituted discrimination in violation of Section 8(a)(3) of the Act (R. 197–199, 248). The Board further concluded that, even if the Company's action were motivated by a policy of not rehiring former employees, the application of that policy to strikers constituted an unwarranted interference with strike activity, in violation of Section 8(a)(1) of the Act (R. 203–205).

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with the exercise of employee rights guaranteed by Section 7 of the Act. The Board ordered the Company to offer the complainants immediate employment, to make them whole for any losses suffered as a result of the discrimination against them and to post appropriate notices (R. 221–225, 249–250).[6]

[6] In addition to the 19 strikers discussed above, the Board also found a discriminatory refusal to reemploy two other

C. THE COURT OF APPEALS DECISION

The court of appeals concluded that substantial evidence supported the Board's finding that the Company refused to rehire the 19 complainants because they had participated in the strike and that the Company's purported application of its policy not to rehire former employees "was a pretext for unlawful discrimination" (Pet. 5a–6a). The court accordingly enforced the Board's order insofar as it remedied that discrimination (Pet. 8a).

ARGUMENT

1. The court of appeals accepted the Board's finding that petitioner's job-hopping rule was utilized only as a pretext for refusing to reemploy the 19 complainants because of their strike activity. Such a refusal to hire constitutes discrimination in violation of Section 8(a)(3) of the Act (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177). The only question presented, therefore, is whether substantial evidence supports the Board's finding that the Company had a discriminatory motive. This evidentiary issue, once carefully reviewed by the court of appeals (Pet. 5a–6a), does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[1]

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strikers, Espinoza and Ruiz (R. 210–213, 248, n. 1). The court of appeals set aside the Board's findings with respect to these two strikers on the ground that there was insufficient evidence that they had applied for reemployment (Pet. 4a) and no issue respecting them is now presented.

[1] Petitioner erroneously contends (Pet. 16–17) that the court of appeals broadly held that a rule against job-hopping may

2. There is no substance to petitioner's contention that the complaint—insofar as it pertained to strikers Alvarado, Ramirez, Faust, and Munoz—was barred by Section 10(b) of the Act (Pet. 17–18). Although these employees first applied for work more than six months before they filed unfair labor practice charges with the Board,[4] the record establishes, as the court below concluded (Pet. 7a), that the applications "were regarded by both the applicants and the Company as *continuing* applications." Accordingly, the Company committed a separate unfair labor practice each time it hired a new employee in preference to one of the complainants. *National Labor Relations Board* v. *Textile Machine Works*, 214 F. 2d 929, 932 (C.A. 3); *National Labor Relations Board* v. *Plumbers and Pipe Fitters Local Union 214*, 298 F. 2d 427, 428 (C.A. 7); and see *Local Lodge No. 1424, IAM* v. *National Labor Relations Board*, 362 U.S. 411, 416. Vacancies which these four complainants were qualified to fill occurred within the six-month periods preceding the service of charges on their behalf (R. 214). *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F. 2d 521 (C.A. 3) and *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2), relied on by petitioner (Pet. 17–18), did not involve such

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not be applied against "replaced strikers." The court stated, however, that "a rule against job-hopping is not in itself unlawful * * *" (Pet. 6a).

[4] Alvarado and Ramirez filed charges on May 12 and 22, 1961, respectively (R. 10, 46), Faust filed a charge on October 27, 1961 (R. 120), and Munoz filed one on November 30, 1961 (R. 137).

separate and independent unlawful acts occurring within the 10(b) period. See the discussion of *Pennwoven* in *Textile Machine Works, supra*, 214 F. 2d at 932.

3. There is similarly no merit to petitioner's contention (Pet. 13–15) that the complaint was improperly issued because the charging parties did not appeal the Regional Director's refusal to issue a complaint within the period specified in the Board's Rules. Although Section 102.19 of the Board's Rules and Regulations (Pet. 23a) prescribes a period of 10 days within which to file such an appeal, there is nothing in the Rules, or in the Act, which precludes the General Counsel, as he did here, from granting an extension of time where necessary to promote the ends of justice or to effectuate the purposes of the Act.[9] As observed by the court of appeals (Pet. 8a), quoting with approval from *National Labor Relations Board* v. *Monsanto Chemical Co.*, 205 F. 2d 763 (C.A. 8), "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice re-

[9] On June 26, 1961, the Regional Director notified the parties that he was refusing to issue a complaint, that an appeal might be taken to the General Counsel under Section 102.19 of the Board's rules, and that upon good cause the General Counsel might grant an extension of time in which to file an appeal. On July 7, the complainants requested an extension, it was granted, and an appeal was filed within the extension allowed. Thereafter, the General Counsel reversed the Regional Director in substantial part and issued a complaint (Pet. 7a–8a).

quire it."[10] *National Labor Relations* v. *United Brotherhood of Carpenters*, 261 F. 2d 166 (C.A. 7), relied on by petitioner (Pet. 15), concerned whether Section 10(k) of the Act and the Board's rules issued thereunder required the Board to decide jurisdictional disputes on their merits and to make an affirmative award of the disputed work. The decision did not touch upon the power of the Board to relax its own time requirements in proceedings before it.[11]

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[10] Section 102.121 of the Board's Rules (29 C.F.R. § 102.121) specifically provides that the Rules "shall be liberally construed to effectuate the purposes and provisions of the act."

[11] Equally insubstantial is petitioner's final contention (Pet. 19) that, since no exceptions were filed by the General Counsel or the charging party to the remedy proposed by the Trial Examiner, the Board lacked power to enlarge that remedy. It is clear that where a party, as did petitioner, files exceptions to parts of a Trial Examiner's decision, the Board has power to review parts of the decision to which no exception was filed, if this would serve the ends of justice or effectuate the policies of the Act. *National Labor Relations Board* v. *WTVJ, Inc.*, 268 F. 2d 346, 348 (C.A. 5); *National Labor Relations Board* v. *Sapulpa Typographical Union No. 619, ITU*, 321 F. 2d 771 (C.A. 10); cf. *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 384 (C.A. 9), certiorari denied, 341 U.S. 909. By requiring petitioner to offer the complainants not only immediate employment, as recommended by the Trial Examiner, but also the seniority and other benefits they would have enjoyed absent the discrimination against them (R. 249, n. 2), the Board simply acted more completely to "undo the effects of [petitioner's] discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 189.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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